IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

RICHARD DAVID REUTER	§	
REG. NO. 04271-180	§	
v.	§	C.A. NO. C-06-259
	§	
BUREAU OF PRISONS	§	

AMENDED MEMORANDUM AND RECOMMENDATION
ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this civil action, plaintiff claims that the Federal Bureau of Prisons ("BOP") has failed to maintain proper records in his Inmate Central File as required by the Privacy Act, 5 U.S.C. § 552a, and that the repeated mistakes have led to serious adverse consequences that have cost him $50,000 in actual damages. (D.E. 1). The government moves to dismiss plaintiff's complaint for failure to exhaust administrative remedies and for failure to state a claim upon which relief can be granted. (D.E. 9). Plaintiff has not filed a response in opposition to the motion.[1]

Because the government relies on matters outside the pleadings, the motion to dismiss is construed as a motion for summary judgment. See Fed. R. Civ. P. 12(b)(6). For the reasons stated herein, it is respectfully recommended that defendant's motion for summary judgment to dismiss plaintiff's complaint be granted, and that plaintiff's claims be dismissed with prejudice.

[1] Pursuant to Local Rule 7.4, "[f]ailure to respond will be taken as a representation of no opposition."

I. JURISDICTION

The Court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1331.

II. PROCEDURAL HISTORY

On June 23, 2006, plaintiff filed this action. (D.E. 1). On September 21, 2006, defendant filed a motion to dismiss. (D.E. 9). This motion, however, was interpreted by the Court as a motion for summary judgment because it included citations to evidence outside the pleadings. (D.E. 11). Based on this interpretation, on January 29, 2007, plaintiff was provided with twenty additional days in which to respond to defendant's motion. Id. To date, plaintiff has not filed any response.

III. BACKGROUND FACTS

On March 10, 2004, plaintiff was sentenced to 36 months in the BOP for violation of his supervised release term. (POC[2] at 3). He was assessed a "greatest severity" public safety factor based on one of his underlying violations, evasion of a motor vehicle, and assigned to the Federal Correctional Institution ("FCI") in Three Rivers, Texas, a medium custody prison, with a total initial custody classification score of 13 points. (POC at 4).

In a facsimile dated November 2, 2004, the Caldwell County Sheriff's Office sent a detainer request to FCI Three Rivers, and

[2] "POC" refers to Plaintiff's Original Complaint, D.E. 1.

thereafter, a detainer was lodged against plaintiff on the underlying charge of theft, in Caldwell County Cause No. 04-187. (POC at 4). The November 2, 2004 fax also noted that the charge for evading arrest with a vehicle, also raised in Caldwell County Cause No. 04-187, had been dismissed because the District Attorney had declined prosecution. (POC, Ex. 1).

By letter dated July 8, 2005, Doris Jones, a BOP Inmate Systems Manager, wrote to the Caldwell County District Attorney and inquired as to the intentions concerning the pending theft charges against plaintiff in Cause No. 04-187. (POC, Ex. 2). She pointed out that Caldwell County had not timely prosecuted the charges against plaintiff that were referenced in the detainer. Id.

On April 24, 2006, plaintiff filed a Request for Administrative Remedy, BOP Form BP-9, complaining to the FCI Three Rivers warden, Joe Driver, that the Caldwell County officials had violated the terms of the Interstate Agreement on Detainers Act, because the detainer lodged against him had expired, yet it remained in his Central File. (D.E. 9, Sweaney Decl., Ex. B.) He requested that Warden Driver have the detainer removed, that his custody classification be reduced to a more favorable level because it was erroneously enhanced based on charges that were dismissed, and that a Halfway House packet be completed so that he could be considered for placement in a

Halfway House facility. Id. By response dated May 25, 2006, Warden Driver denied plaintiff's BP-9 request. (D.E. 9, Sweaney Decl., Ex. C).

On June 27, 2006, plaintiff filed a Regional Administrative Remedy Appeal with the Regional Director raising the same claims. (D.E. 9, Sweaney Decl., Ex. D). The Regional Director denied his BOP Form BP-10 request. (D.E. 9, Sweaney Decl., Ex. E.).

On June 23, 2006, plaintiff filed this action. (D.E. 1). In his original complaint, he alleged that the BOP should have removed the Caldwell County detainer from his Central File because Caldwell County failed to bring him to trial on the charges in the allotted time. He argues that the BOP chose to leave the detainer in his Central File, thus maintaining inaccurate records. He further alleges that the BOP wrongfully used the evading arrest charge, that was eventually dismissed, to calculate his custody classification, and that had it not done so, he would have been confined at a low-security, and ostensibly more desirable, facility. Finally, he argues that the BOP has failed to process a Halfway House release packet. He seeks compensatory damages of $50,000, plus court costs. (POC at 24).

IV. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue

exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The Court must examine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. In making this determination, the Court must consider the record as a whole by reviewing all pleadings, depositions, affidavits and admissions on file, and drawing all justifiable inferences in favor of the party opposing the motion. Caboni v. Gen. Motors Corp., 278 F.3d 448, 451 (5th Cir. 2002). The Court may not weigh the evidence, or evaluate the credibility of witnesses. Id. Furthermore, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e); see also Cormier v. Pennzoil Exploration & Prod. Co., 969 F.2d 1559, 1561 (5th Cir. 1992) (per curiam) (refusing to consider affidavits that relied on hearsay statements); Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547, 549 (5th Cir. 1987) (per curiam) (stating that courts cannot consider hearsay evidence in affidavits and depositions). Unauthenticated and unverified documents do not constitute proper summary judgment

evidence. King v. Dogan, 31 F.3d 344, 346 (5th Cir. 1994) (per curiam).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party demonstrates an absence of evidence supporting the nonmoving party's case, then the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). To sustain this burden, the nonmoving party cannot rest on the mere allegations of the pleadings. Fed. R. Civ. P. 56(e); Anderson, 477 U.S. at 248. "After the nonmovant has been given an opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted." Caboni, 278 F.3d at 451. "If reasonable minds could differ as to the import of the evidence ... a verdict should not be directed." Anderson, 477 U.S. at 250-51.

The evidence must be evaluated under the summary judgment standard to determine whether the moving party has shown the absence of a genuine issue of material fact. "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the

governing law will properly preclude the entry of summary judgment." Id. at 248.

V. DISCUSSION

A. Plaintiff Failed To Exhaust Under 42 U.S.C. § 1997e(a).

The Prison Litigation Reform Act ("PLRA") provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).[3]

The exhaustion requirement applies to *all* inmate suits about prison life, whether involving general circumstances or specific incidents. Porter v. Nussle, 534 U.S. 516, 524 (2002). Moreover, a prisoner is required to exhaust his administrative remedies even if damages are unavailable through the grievance process. Booth v. Churner, 532 U.S. 731, 741 & n.6 (2001); Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001). The exhaustion requirement is not jurisdictional. Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998) (per curiam). Dismissal without prejudice is appropriate where the exhaustion requirement has not been met. See id. at 296.

[3] The government cites to the exhaustion provisions of 28 U.S.C. § 2241, (D.E. 9, at 3), but plaintiff did not file this action as a habeas corpus proceeding, nor has it been treated as one by the Court.

The government moves to dismiss plaintiff's complaint for failure to exhaust fully his administrative remedies.

The BOP provides a three-tiered administrative process by which inmates can present a complaint. 28 C.F.R. § 542.10 et. seq. First, the inmate must present the complaint informally on a Form BP-8 to a staff member at the facility where he is housed. 28 C.F.R. § 542.13(a). If this informal procedure does not resolve the issue, the inmate then commences the three-tiered administrative remedy procedure by filing a formal written complaint on a Form BP–9 with the warden at the local level. 28 C.F.R. § 542.14. If unsatisfied with the warden's response, the inmate may submit an appeal on Form BP-10 within twenty days of the response to the regional director. 28 C.F.R. § 542.15. If unsatisfied at the regional level, then the inmate has thirty days from the date of the regional director's response to submit an appeal on Form BP-11 to the general counsel. Id. The appeal to the General Counsel is the final administrative appeal provided by the BOP.

In this case, the undisputed evidence establishes that plaintiff pursued his administrative remedies through the regional level by filing his BP-8, BP-9, and BP-10 requests for administrative remedies, and received responses from the warden and the regional director. (See D.E. 9, Sweaney Decl., Ex. B, C,

D, and E).[4] However, he did not pursue his claim through the final step of the appeal process, to the general counsel. (See, D.E. 9, Sweaney Decl. at ¶ 7). Thus, plaintiff has failed to exhaust his administrative remedies.

The Fifth Circuit has recognized that the exhaustion requirement may, in rare circumstances, be excused where dismissal would be inefficient or would not further the purposes of the PLRA. Underwood, 151 F.3d at 296. For example, exhaustion may be excused where irregularities in the prison administrative system itself prohibited the plaintiff from doing so. Id. (citing Shah v. Quinlin, 901 F.2d 1241, 1244 (5th Cir. 1990)). An administrative remedy is not available where prison officials ignore or interfere with the prisoner's pursuit of relief. Id. (citing Holloway v. Gunnell, 685 F.2d 150, 154 (5th Cir. 1982)).

In this case, in not filing a response, plaintiff has failed to offer any explanation as to why he did not pursue his administrative remedies to their conclusion. Moreover, the fact that he filed his BP-8, BP-9, and BP-10 is some evidence that he understood the administrative process and knew how to avail himself of it. There is no evidence that he was in any manner prevented from pursuing his administrative remedies.

[4]Although the record does not contain a copy of plaintiff's informal BOP Form BP-8, it is clearly referenced in his BOP Form BP-9, and defendant does not dispute that it was filed.

The evidence also suggests that plaintiff had no intention of pursuing his administrative remedies to completion. He filed this action on June 23, 2006. (See D.E. 1). However, his Form BP-10 grievance was not denied by the Regional Director until August 28, 2006. (See D.E. 9, Ex. E). That is, he filed this lawsuit before he had even received an answer from the Regional Director on his claims. It appears that plaintiff had no plans to bring his claims to the General Counsel through the filing of a Form BP-11.

Plaintiff has failed to exhaust his administrative remedies, and there are no grounds to excuse exhaustion. Thus, it is respectfully recommended that the government's motion for summary judgment to dismiss plaintiff's complaint for failure to exhaust administrative remedies be granted, and that plaintiff's claims be dismissed. Because plaintiff would now be time barred from pursuing his claims administratively, it is respectfully recommended that the dismissal be with prejudice. See Marsh v. Jones, 53 F.3d 707, 710 (5th Cir. 1995) (district court has the authority to dismiss unexhausted claims with prejudice if they would be administratively time barred).

B. Plaintiff Failed To State A Claim.

Alternatively, plaintiff's action should be dismissed for failure to state a claim upon which relief can be granted. He claims that BOP officials intentionally relied upon inaccurate

records to raise his security classification, in violation of the Privacy Act, 5 U.S.C. § 552a. He asserts that as a result of the BOP's inaccurate record keeping and its failure to remove the detainer and dismissed charge from his Central File, he was confined in a medium-security, rather than low-security, prison, which rendered him ineligible for placement in a Residential Re-entry Center, also known as a Halfway House.

Plaintiff's Privacy Act claim requires proof that defendant "willfully or intentionally" failed to correct inaccurate information about his sentence, and that the information was erroneously relied upon to ***establish*** his security classification. See 5 U.S.C. § 552a(g)(1)(4); Whitley v. Hunt, 158 F.3d 882, 889 (5th Cir. 1989), abrogated on other grounds, Booth, 532 U.S. at 735. In this case, the evidence shows that, at the time plaintiff's security classification was ***established***, the evasion of arrest and theft charges were pending against him, and in fact, these charges, in part, contributed to the revocation of his supervised release term. (See D.E. 9, Ex. F). Moreover, plaintiff admits that these charges were pending at the time his security classification was determined:

> Based upon the severity of the alleged offense of "Evasion," the defendant assessed a 7 point "Greatest Severity" Public Safety Factor against the Plaintiff's Custody Classification Score which resulted in the plaintiff's designation to a medium facility – FCI Three Rivers – pursuant to an assessed

> total initial Custody Classification Score of 13 points.

(POC at 4). It was not until November 4, 2004, that the Caldwell County District Attorney moved to dismiss the evasion of arrest charge and filed a detainer on the theft charge. (See POC, Ex. 1). The detainer was then valid for 180 days, or until early May 2005. In ***establishing*** plaintiff's classification custody, the BOP relied on accurate information. Thus, plaintiff fails to state a Privacy Act claim because he cannot show that the BOP knowingly relied on false information in ***establishing*** his custody classification, and in fact, it relied on accurate information.

Plaintiff suggests that, under the Privacy Act, the BOP was required to make changes to his Central File to reflect the expiration of the detainer and the fact that the evasion of arrest charge was dismissed. However, according to 28 C.F.R. § 16.97(a), the Privacy Act specifically exempts the Inmate Central Record System from having to remove or change information in an inmate's file. See 5 U.S.C. § 552a(c)(3) and (4), (d), (e)(2) and (3), (e)(4)(H), (e)(8)(f) and (g).

Finally, it is important to note that an inmate has no protected liberty interest in his classification. Wilkerson v. Stalder, 329 F.3d 431, 435-36 (5th Cir. 2003) ("This circuit has continued to hold post-*Sandin* that an inmate has no protectable liberty interest in his classification."). Nor does he have a

constitutionally protected interest to be housed in a particular prison. Tighe v. Wall, 100 F.3d 41, 42 (5th Cir. 1996) (per curiam) (citing Olim v. Wakinekona, 461 U.S. 238, 244-45 (1983)). Thus, even if the inaccurate records resulted in adverse decisions regarding his placement, because he has no protected interest in his classification or housing, he fails to state a claim upon which relief can be granted. See generally Sandin v. Conner, 515 U.S. 472, 484 (1995) (due process does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner, but rather those changes that impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life). The fact that the BOP did not later go back and ***change*** plaintiff's classification custody to reflect that the evasion charge had been dismissed, or that the detainer had expired fails to state a constitutional violation because plaintiff has no protected liberty interest in his classification status. Wilkerson, 329 F.3d at 436. The fact that an expired, unenforced detainer and a dismissed charge remained noted in plaintiff's Central File does not present the type of atypical hardship that triggers the due process clause. Sandin, 515 U.S. at 484; Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999).

Accordingly, it is respectfully recommended that plaintiff has failed to establish a claim pursuant to the Privacy Act.

VI. RECOMMENDATION

For the foregoing reasons, it is respectfully recommended that defendant's motion for summary judgment, (D.E. 9), be granted, and that plaintiff's claims be dismissed with prejudice for failure to exhaust administrative remedies and for failure to state a claim upon which relief can be granted.

Respectfully submitted this 26th day of February 2007.

BRIAN L. OWSLEY
UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **TEN (10) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to 28 U.S.C. § 636(b)(1)(C); Rule 72(b) of the Federal Rules of Civil Procedure; and Article IV, General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendations in a magistrate judge's report and recommendation within TEN (10) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).